

MORGAN LOEBEL)	
Claimant)	
VS.)	
)	Docket No. 1,035,795
HUEMANN & ASSOCIATES)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	

1. Did the ALJ err in finding that claimant's alleged injuries to his neck and bilateral upper extremities are causally related to his employment with respondent? Respondent argues that claimant's ongoing problems with his neck and bilateral upper extremities result from preexisting conditions or are the result of outside injuries and not from his work duties with respondent. Respondent further contends that the physical requirements of claimant's job are not repetitive and,

instead, are no different than the normal activities of day to day living. Claimant contends the medical opinion of Dr. Curtis supports claimant's contentions that his neck and upper extremity problems stem from his work for respondent and are therefore compensable.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has been a dental ceramicist for respondent for over 17 years. His job duties require that he hold small dental pieces and, using high speed equipment, create crowns, bridges and other dental appliances. This hand intensive activity is not especially fast and not at all heavy, with the most weight being 2-3 pounds. However, it is somewhat repetitious and requires constant movement with both hands.

In 2007, claimant began experiencing pain and burning, primarily in his right shoulder. He underwent a job site analysis, performed by St. Francis Health Center on May 23, 2007. The analysis indicated claimant's height of 6 feet 2 inches created a problem and his work space/environment did not allow him to work in a good ergonomic position. The work station required that claimant work in a rounded posture with his head/neck flexed forward and downward. His wrists were supported by a hard metal edge of a drawer, which put downward pressure into his wrists while he was holding/manipulating small tools and grasping small dental pieces. Several adjustments to his work station were recommended.

Claimant was evaluated by Dr. Curtis on July 26, 2007. The initial impression was one of right shoulder rotator cuff tendinitis with a possible subscapularis muscle tear, painful right AC joint, moderate right biceps tendinitis, and cervicalgia in the right shoulder and neck. Dr. Curtis opined that claimant's shoulder and neck symptoms were the result of his employment with respondent. An orthopedic evaluation was recommended to determine if surgery was an option for the right shoulder. Pain management was recommended for the left shoulder and neck.

Claimant came under the care of board certified orthopedic surgeon Peter S. Lapse, M.D., and on July 23, 2007, underwent an injection in his right shoulder over the area of the biceps. This provided only temporary relief. He returned to work for respondent with restrictions.

Claimant was then referred to Thomas S. Samuelson, M.D., of the Kansas City Bone & Joint Clinic, and underwent a right shoulder arthroscopic subacromial decompression with distal clavicle excision and anterior labral debridement on September 27, 2007. After a period of post-surgery physical therapy, claimant returned to work with

respondent. However, claimant again developed problems and was returned to Dr. Samuelson on November 17, 2008. Dr. Samuelson opined that claimant's ongoing right shoulder pain was related to cervical spine pathology and not to the shoulder problems of the past. Claimant's left shoulder was asymptomatic on the date of the examination, but home exercises were recommended. Dr. Samuelson's report did note radiating pain down claimant's right arm into his hand and fingers. EMG/NCV tests, x-rays and possible MRI were recommended for the cervical spine symptoms. No added followup was recommended for the right shoulder. Claimant was found to be at maximum medical improvement (MMI).

Claimant was returned to Dr. Curtis for an evaluation on April 29, 2009. At that time, claimant's symptoms had worsened to include both upper extremities. He was experiencing tingling in his hands and arms with right lateral forearm pain and pain in the center of his hands. Claimant also had shooting pain from the right lateral aspect of his neck and neck spasms. Dr. Curtis noted that claimant had returned to Dr. Samuelson in February 2009 but was found to be medically stable and no follow-up appointment was scheduled.

Claimant was diagnosed with clavicular ostosis and AC ostosis, cervicalgia, present since July 2007, possible cervical radiculopathy or discogenic pain at C5-6, right lateral epicondylitis, right medial epicondylitis, right wrist tendinitis, right carpal tunnel syndrome and cubital tunnel syndrome, right finger flexor tendinitis, left lateral epicondylitis, left medial epicondylitis, left wrist tendinitis, left carpal tunnel syndrome, left finger flexor tendinitis, mechanical posture problems of the cervical, thoracic and lumbar spines, and dysthymia, secondary to chronic pain. Dr. Curtis opined that claimant's neck problems from 2005 were stabilized by the physical therapy given for the shoulder. However, claimant's current problems are the result of his ongoing employment with respondent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused

¹ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

This Board Member finds the opinion of Dr. Curtis to be the most persuasive. Claimant works at a job that is somewhat repetitious, yet requires many hours labor at what appears to be a non-ergonomic workstation. His physical movements are not heavy or abnormally fast. Yet, they are continuous, although with task rotation being built into the job. Respondent does not dispute the relationship of claimant's shoulder complaints to the job. The dispute stems from the other upper extremity symptoms and the cervical complaints and their relationship to claimant's work tasks. Here, while Dr. Lepse and Dr. Samuelson provide medical treatment, they do not address the cause of the ongoing symptoms in claimant's extremities and neck. Dr. Curtis finds the ongoing complaints stem from claimant's work duties with respondent. This Board Member finds Dr. Curtis' opinion to be the most persuasive. The finding by the ALJ that claimant is entitled to ongoing medical treatment for his neck and upper extremities is affirmed.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁴

While respondent contends that claimant's cervical problems stem from a pre-existing condition in 2005, Dr. Curtis found claimant's ongoing work duties have aggravated the previous neck condition. In Kansas, that is enough to make the condition the responsibility of the employer.

Finally, respondent argues that claimant's labors are no different than the day to day activities encountered by claimant outside the job. However, the continuous motion, even with task rotation, is not the type of activity encountered on a daily basis outside one's job. The Kansas Court of Appeals discussed the normal activities of day to day living in *Johnson*.⁵ In *Johnson*, the court considered whether Johnson, who injured her left knee when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead, had suffered an injury which arose out of and in the course of her

³ K.S.A. 2008 Supp. 44-501(a).

⁴ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁵ *Johnson v Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

employment with Johnson County. The court, citing *Martin*⁶ and *Boeckman*,⁷ ruled that for an injury which occurs at work to be work related and compensable, it must be “fairly traceable to the employment” as contrasted with hazards to which a worker “would have been equally exposed apart from the employment.”⁸

Here, the actions of claimant do not constitute activities which would be deemed normal activities of day-to-day living. The work duties are more repetitious and the job station more restrictive than one would encounter at home or away from a job. This Board Member finds that claimant’s injuries are the result of his work with respondent. The actions required in performing that job are above and beyond the normal actions of day-to-day living.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proof that the problems he is experiencing in his upper extremities and neck are the result of work related accidents which arose out of and in the course of his employment with respondent and not from actions of day to day living. Therefore, the Order of the ALJ granting claimant medical treatment for his neck and upper extremities is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Medical Treatment of Administrative Law Judge Brad E. Avery dated July 10, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

⁶ *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

⁷ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

⁸ *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

⁹ K.S.A. 44-534a.

Dated this ____ day of September, 2009.

HONORABLE GARY M. KORTE

c: Beth Regier Foerster, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge